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No. 97-2049

In The

Supreme Court of the United States

October Term, 1997

CONDOR INSURANCE COMPANY,

Petitioner,

vs.

LISA CHRISTINE ERIKSEN,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of California

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

GREGORY F. STANNARD
Law Offices of Gregory F. Stannard
200 Corporate Point, Suite 125
Culver City, California 90230-8721
(310) 642-6980

LARRY A. ROTHSTEIN
Attorney at Law
21700 Oxnard Street, Suite 960
Woodland Hills, California 91367-3642
(818) 716-2662

HARRY W.R. CHAMBERLAIN II
Counsel of Record
MARTHA A. SHEN
GINSBURG, STEPHAN, ORINGHER & RICHMAN
A Professional Corporation
10100 Santa Monica Boulevard, 8th Floor
Los Angeles, California 90067-4012
(310) 557-2009
Attorneys for Petitioner Condor Insurance Company

24 pp

TABLE OF CONTENTS

	Page
SUMMARY OF REPLY ARGUMENT	1
ARGUMENT	2
A. Contrary To Eriksen's Opposition, The Certified Records Of The California Supreme Court Establish That Condor Timely Raised The Constitutional Issues Set Forth In The Petition	2
B. The Factual Statements Contained In The Petition Are Supported By The Appended Court Records—Any Contrary Facts Asserted By Eriksen Demonstrate That There Exists At Least A Legitimate Dispute Regarding The Merits Of Her Claims Which Constitutionally Precluded Enforcement Of The Default Judgment Under Condor's Policy Without Prior Notice And The Opportunity To Defend The Underlying Lawsuit	5
C. California's Most Recent Reported Decision Interpreting The Statement of Damages Requirement Rejects Eriksen's "Liberal Construction" Argument On Due Process Grounds	8
CONCLUSION	10

Page

SUPPLEMENTAL APPENDIX

SUPPLEMENTAL APPENDIX M—PETITION FOR REVIEW FILED DECEMBER 22, 1995, CONDOR INSURANCE COMPANY VS. LOS ANGELES COUNTY SUPERIOR COURT, California Supreme Court Case No. S050791 (excerpted) 96a

SUPPLEMENTAL APPENDIX N—PETITION FOR REVIEW FILED JANUARY 29, 1998, LISA CHRISTINE ERIKSEN VS. CONDOR INSURANCE COMPANY, California Supreme Court Case No. S067653 (excerpted) 100a

TABLE OF AUTHORITIES CITED

	Page
CASES	
Cedars-Sinai Medical Center v. Superior Court, 18 Cal.4th 1, 954 P.2d 511 (1998)	4
Gospel Army v. Los Angeles, 331 U.S. 543 (1947)	3
Home Indemnity v. King, 34 Cal.3d 803, 670 P.2d 340 (1983)	3,4
Metropolitan Service Corp. v. Casa de Palms, Ltd., 31 Cal.App.4th 1481, 37 Cal.Rptr.2d 575 (1995)	6
Pasadena Medi-Center Associates v. Superior Court, 9 Cal.3d 773, 511 P.2d 1180 (1973)	9
Peralta v. Heights Medical Center, Inc., 485 U.S. 80 (1988)	8
Samson v. Transamerica Ins. Co., 30 Cal.3d 220, 636 P.2d 32 (1981)	10
Surgin Surgical Instrumentation, Inc. v. Truck Ins. Exch., 64 Cal.App.4th 1409, 76 Cal.Rptr.2d 303 (June 23, 1998)	2,8,9
Wright v. Fireman's Fund Ins. Cos., 11 Cal.App.4th 998, 14 Cal.Rptr.2d 588 (1992)	
STATUTES, REGULATIONS AND RULES	
California Code of Civil Procedure	
§ 473	6
§ 473(b)	7
California Insurance Code	
§ 11580	3

TABLE OF AUTHORITIES CITED

	Page
California Public Utilities Commission	
General Order No. 100	3
California Rules of Court	
Rule 28(e)(2)	3
28 U.S.C.	
§ 1257(a)	5
§ 2101(c)	5
U.S. Supreme Court Rules	
Rule 24.6	5

TEXTS AND OTHER AUTHORITIES

LEWIS CARROLL, ALICE IN WONDERLAND, Ch. 12	10
R. STERN, ET AL., SUPREME COURT PRACTICE (7th ed. 1993)	
§ 3.19	3
§13.11(j)	5
8 B. WITKIN, CAL. PROCEDURE (4th ed. 1997)	
Attack On Judgment In Trial Court §§ 218-220	7

SUMMARY OF REPLY ARGUMENT

The Brief in Opposition of Respondent Eriksen argues that the Petition raises "issues which were not presented to the lower courts and contains misstatements [of fact]." (Brief in Oppos. at p. 1.) Her argument is unfounded. To dispel Eriksen's misapprehension about the issues actually raised, Condor lodges herewith the certification of the California Supreme Court of its records setting forth the specific "Issues Presented" by Condor in that court. Accordingly, the questions posed in the pending Petition for Certiorari were raised and passed upon by California's highest court when it twice denied review in the underlying proceedings. (See Section II.A. at pp. 2-5, *infra.*)

Moreover, each of the factual statements contained in the Petition for Certiorari is supported by an appropriate reference to the record in the Appendix. By contrast, Eriksen's unsupported assertion—without reference to the record—that the facts stated by Condor are "patently false" merely underscores that legitimate disputes exist regarding the merits of the liability and damages issues arising out of all five of her separate accident claims; for example, her claims have now expanded to include a "severely damaged" automobile which she did not own, and was not identified in her Statement of Damages. (Brief in Oppos. at pp. 2-3.) Eriksen herself acknowledges that, but for the Common Carrier endorsement, a liability insurer in Condor's position would have standing (either as an intervenor in the underlying lawsuit *or* as a defendant in her subsequent "direct action" for collection on the policy) to contest her claims on the merits. Condor employed *both* alternative procedures; timely raising the constitutional challenges to the validity of the default judgment she procured against its insureds, and the enforceability of that judgment in the present action on its insurance policy. (See, e.g., *id.* at pp. 2, 4-6 & fn. 1; see also Section II.B. at pp. 5-8, *infra.*)

Eriksen next erroneously maintains that her unsegregated Statement of Damages pertaining to all five accidents may be "liberally construed" consistent with due process. Her position

is contrary to controlling authority, including the most recent decision of the California Court of Appeal to interpret the Statement of Damages statute. *Surgin Surgical Instrumentation, Inc. v. Truck Ins. Exch.*, 64 Cal.App.4th 1409, 1418-1420, 76 Cal.Rptr.2d 303, 307-310 (June 23, 1998) vacated a $57 million default judgment in an action against an insurance company, owing to the plaintiff's failure to strictly comply with the constitutional requirement of providing a precise statement of the damages it was seeking before the entry of default. This recent case further illustrates the magnitude of the constitutional deficiencies inherent in allowing Eriksen's default judgment to be given *res judicata* effect against Condor— without prior notice of the underlying liability action or an opportunity to dispute the merits of her claims. (See Section II.C. at pp. 8-10, *infra.*)

Certiorari should be granted to provide guidance to the courts of California, and other jurisdictions with similar insurance regulations, regarding the proper application of the Due Process Clause to the procurement of default judgments, and the enforceability of such judgments against third party liability insurers.

ARGUMENT

A. Contrary To Eriksen's Opposition, The Certified Records Of The California Supreme Court Establish That Condor Timely Raised The Constitutional Issues Set Forth In The Petition

Eriksen asserts that Condor "never questioned the constitutionality or validity" of the insurance regulations which she asserted in the California courts below should have preclusive effect in binding Condor to pay the default judgment against its insureds. (Brief in Oppos. at p. 12.) She further contends that Condor did not "exhaust its legal remedies" by pursuing the underlying litigation to conclusion (after the entry of the default judgment) and that its arguments are limited to whether that judgment was the product of fraud or collusion. (*Id.* at pp. 6-8, 12.)

Not so. The accompanying records certified by the California Supreme Court set forth the "Issues Presented" in Condor's two Petitions for Review that were passed upon by California's highest court. Both of Condor's submissions in the California Supreme Court challenged whether Eriksen's default judgment against its insureds was constitutionally "void on its face" for failure to specify the precise damages she was claiming as the result of her fifth, and last, accident with Quality Rock's cement truck. (Condor's Petition for Review filed Dec. 22, 1995, Supp. App. M at pp. 96a-99a appended hereto; Condor's Petition for Review filed Jan. 29, 1998, Supp. App. N at pp. 100a-104a.)[1]

Condor's applications to the California Supreme Court also questioned the applicability and validity of *Home Indemnity v. King,* 34 Cal.3d 803, 670 P.2d 340 (1983). *Home Indemnity* interpreted the same insurance regulations (PUC General Order No. 100 and Cal. Ins. Code §11580) which are the

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[1] Condor is certainly surprised that Eriksen would attempt in the face of this record to deny that the constitutional questions pending before this Court were, in fact, "presented" in the courts below. Rule 28(e)(2) of the California Rules of Court requires that at "the beginning of the body of the petition [for review in the California Supreme Court], the petition shall state ***the issues presented for review***, expressed in the terms and circumstances of the case..." (Emphasis added.) While the California Supreme Court "has taken the position that it is "powerless for want of jurisdiction' to issue a certificate" in the form a separate statement attesting that "Federal questions" were raised, the Clerk of that court has attested and certified the contents of the petitions filed by Condor containing the precise issues raised therein. R. STERN, ET AL., SUPREME COURT PRACTICE, §3.19 at pp. 133-134 (7th ed. 1993) citing *Gospel Army v. Los Angeles*, 331 U.S. 543, 548 (1947) ("both the judgment and the opinion *as well as other circumstances* which may be pertinent" are subject to review to determine issues raised and finality of the judgment below) (emphasis added). Excerpts of the certified records of the California Supreme Court (served and lodged herewith) are reprinted in the Supplemental Appendix at the end of this Brief.

subject of the petition before this Court.[2] Despite the absence of actual notice of Eriksen's underlying action against its insureds (Quality Rock and Schuler), the superior court enforced the judgment under Condor's policy. Relying upon *Home Indemnity*, the trial court reasoned that due to the PUC endorsement Condor's ability to contest enforcement of the default judgment was limited to a "finding of extrinsic fraud or mistake, [otherwise] the defendant insurance company is liable on the judgment." (Petition for Cert., App. C at p. 13a; App. B at pp. 4a-5a & fn. 3, pp. 8a-9a.) The decision of the Court of Appeal affirming the trial court only addressed the first issue; namely, whether the default judgment was void on its face as a result of the unsegregated Statement of Damages (*id.*, App. B at pp. 5a-8a). Its opinion ignored, without discussion, the second and equally compelling constitutional question of whether collateral estoppel effect could be given to the default judgment consistent with Due Process in Eriksen's subsequent "direct action" for enforcement under the insurance policy.

Thus, Condor raised at the earliest opportunity—in the California Supreme Court—whether that court's *Home Indemnity* decision and the applicable California insurance regulations could be read so expansively. (Supp. App. N at pp. 102a-104a; see also Petition for Cert. at p. 27, fns. 22-23.) Obviously, because the lower California courts would be bound by the California Supreme Court's precedent in *Home Indemnity*, "it would therefore have been pointless to raise the issue there." *Cedars-Sinai Medical Center v. Superior Court*, 18 Cal.4th 1, 6-7, 954 P.2d 511, 514 (1998) (internal citations omitted). The issues presented in this case were timely raised

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[2] Condor's December 1995 Petition for Review followed the denial of a statutory writ of mandate by the California Court of Appeal after the trial court granted summary adjudication of the validity of Eriksen's default judgment. (See Petition for Cert. at p. 9 & fn. 7.) The second Petition for Review followed the regular appellate process; i.e., raising substantially the same issues after the Court of Appeal had rendered a written opinion following entry of judgment in the trial court. (*Id.*at pp. 10-11.)

in the state courts and are properly before this Court. 28 U.S.C. §§ 1257(a), 2101(c).

B. The Factual Statements Contained In The Petition Are Supported By The Appended Court Records—Any Contrary Facts Asserted By Eriksen Demonstrate That There Exists At Least A Legitimate Dispute Regarding The Merits Of Her Claims Which Constitutionally Precluded Enforcement Of The Default Judgment Under Condor's Policy Without Prior Notice And The Opportunity To Defend The Underlying Lawsuit

Regrettably, the Brief in Opposition resorts to unwarranted personal attacks on Condor and its counsel, asserting that the Petition's factual statements are the product of "misrepresentations and inadmissible evidence . . . ." (Cf. Brief in Oppos. at pp. 1, 12.) See U.S. Supreme Court Rule 24.6; STERN, ET AL., SUPREME COURT PRACTICE, § 13.11(j) at p. 554. Each fact contained in the Petition is supported by an appropriate reference to the record below. Indeed, the police report (which Eriksen characterizes as "inadmissible hearsay") was submitted in evidence in the superior court by the declaration of her own attorney. (Petition for Cert., App. J at 68a-76a.) By contrast, Eriksen's contention that *her* "1985 Ford Tempo automobile was severely damaged" and that "all medical evidence" established that she suffered substantial and permanent injuries in the accident with William Schuler are not supported by any citations to the "record." (Brief in Oppos. at pp. 2-4.) Neither is her speculation that "it is believed that the [investigating] officer and Schuler were longtime friends." (*Id.* at p.3.) The reason is simple: There was *no record* of the evidentiary support she submitted to obtain her judgment in excess of $228,000 against Condor's insureds because there never was a contested trial on the merits.[3]

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[3] Eriksen's unsegregated Statement of Damages contained no claim for the damage to *her* Ford Tempo automobile. (Petition for Cert. at pp. 5-6; App. H at pp. 42a-43a.) According to the police

(footnote continues)

Condor does not suggest that this Court become the ultimate arbiter of disputed "facts." The factual contentions raised in opposition to the Petition well illustrate the fundamental principles that lie at the heart of the Due Process requirements of notice and the opportunity to be heard: "The policy of the law [which] favors determination on the merits, not by default." *Metropolitan Service Corp. v. Casa de Palms, Ltd.*, 31 Cal.App.4th 1481, 1488, 37 Cal.Rptr.2d 575, 579 (1995).

The *salient facts* are not in substantial dispute:

> Eriksen's pre-printed "form complaint" and her Statement of Damages sought recovery for the personal injuries she allegedly suffered in five separate and distinct accidents between 1988 and 1989. (Petition for Cert. at 4-5; App. H at pp. 33a-41a.)
>
> Over three years passed before the default judgment was taken against Schuler and Quality Rock, and that judgment was entered *nine months* before notice of Eriksen's lawsuit was first received by Condor in December 1993—outside the six month statutory time limit for relief from default under California Code of Civil Procedure § 473. (Petition for Cert. at pp. 7-8; App. I at pp. 53a-54a; App. J at pp. 68a-69a.)[4]
>
> Eriksen maintained that the regulatory scheme relating to Common Carrier insurance precluded Condor from contesting the merits of her default judgment because it was "final." (See Brief in Oppos. at 7, 12.)

(footnote continued)

report submitted in evidence by her counsel, the car she was driving was a rental owned by a company called Wheels Inc., and that "owner" made a claim directly to Quality Rock for reimbursement of the property damage to *its* automobile. (*Id.*, App. J at p. 70a; see also Patricia Lombardo Decl., ¶¶ 7-8 at pp. 62a-63a.)

[4] The passage of more than seven years since the filing of Eriksen's underlying action is a delay of her own making. At all times after receiving notice of that lawsuit, Condor was and still is prepared to litigate Eriksen's claims on their merits.

> By virtue of the PUC endorsement attached to its policy, the California courts concluded that the default judgment would be given res judicata effect in the action to collect on Condor's policy because its motion to vacate the default "was required to comply with the time limits set forth in Code of Civil Procedure section 473, subdivision (b)"; i.e., within six months from the entry of the judgment. (Petition for Cert., App. B at p. 8a; App. C at p.13a; see also Petition for Cert. at pp. 21-22 & fn. 16.)

Eriksen mistakenly asserts that "Condor refused to participate in the underlying litigation," and that the only method of vacating the default judgment was for Condor to assume Quality Rock's appeal from the default judgment. (Brief in Oppos. at pp. 5-6 & fn. 1.) One of several alternative remedies available to an automobile liability insurer is to intervene to set aside the default where its policy may ultimately be liable on the judgment. (Petition for Cert. at pp. 19-20; 8 B. WITKIN, CAL. PROCEDURE, *Attack On Judgment In Trial Court,* § 218 at p. 721 (4th ed. 1997).) Where an insurance company does so, however, it is essentially requesting declaratory relief regarding a contingent future liability. Alternatively, the carrier may await the subsequent "direct action" to garnish the proceeds of its insurance policy in satisfaction of the default judgment and raise challenges to its validity at that time. *Wright v. Fireman's Fund Ins. Cos.*, 11 Cal.App.4th 998, 1019, 14 Cal.Rptr.2d 588, 594 (1992). (Petition for Cert. at pp. 23-27; see also Supp. App. N at pp. 102a-104a.) In the present case, there would have been no purpose served by Condor continuing to pursue a duplicative "motion to vacate" in the original action—Quality Rock had declared bankruptcy and Eriksen's "direct action" against Condor was already underway. Contrary to her views, California procedure does not require that the remedy of a motion to vacate in the original action be exhausted before challenges to the default judgment can be raised in subsequent proceedings: "The remedies are distinct and cumulative." See 8 B. WITKIN, CAL. PROCEDURE, §§ 219-220 at pp. 722-723.

At a minimum, Eriksen's disputed "facts" suggest several potentially meritorious defenses existed to her claims—against Condor's insureds and in her subsequent collection action. But even if that were not so, Due Process would still entitle Condor as a non-party without notice of the prior action to contest the default judgment: "Where a person has been deprived of property in a manner contrary to the most basic tenants of due process, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense on the merits." *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 86-87 (1988). Condor has such defenses, and is constitutionally entitled to assert them.

C. California's Most Recent Reported Decision Interpreting The Statement Of Damages Requirement Rejects Eriksen's "Liberal Construction" Argument On Due Process Grounds

Eriksen's "liberal construction" argument likewise fails to pass constitutional muster. (Brief in Oppos. at pp. 9-10.) The most recent California decision to interpret the "codified due process" protection of a separate statement of damages directly refutes her claim. *Surgin Surgical Instrumentation, Inc. v. Truck Ins. Exch.*, 64 Cal.App.4th 1409, 76 Cal.Rptr.2d 303 (June 23, 1998) was decided barely a week after this Petition was filed. Surgin purchased a liability policy from Truck, and thereafter became embroiled in a lawsuit with one of its competitors. Truck declined to defend, and Surgin ultimately settled the competitor's lawsuit on allegedly "unfavorable terms." The insured thereafter sued Truck for breach of contract and bad faith. During the course of the coverage litigation, Truck engaged in wilful discovery misconduct by failing to turn over documents in violation of court orders.

As a discovery sanction, the trial court entered Truck's default and at a "prove-up" hearing awarded Surgin compensatory and punitive damages in excess of $57 million. The California Court of Appeal reversed the judgment on due process grounds—the failure to serve an itemized statement of damages, "specify[ing] a dollar amount." 64 Cal.App.4th at

1416-1418, 76 Cal.Rptr.2d at 307-308. The notice and specificity requirements of the statement of damages procedure "are of constitutional dimension." *Ibid.*

Surgin unsuccessfully argued that Truck had "constructive notice" of the amount of damages it was claiming because, as a party to the action, that information had been provided during discovery and in settlement demands sent to its counsel before entry of default exceeding $60 million. The *Surgin* court held these due process protections were not satisfied:

> It is not clear whether Surgin is seeking $825,000, $2-3 million, or $62 million in damages. The purpose of requiring notice to the defendant of the damages sought is to provide the defendant with " 'one last clear chance' to respond to the allegations of the complaint and to avoid the ***precise consequences*** ... of a judgment for a substantial sum ... without any actual notice of ... potential liability." 64 Cal.App.4th at 1419-1420, 76 Cal.Rptr.2d at 309 (internal citations and brackets omitted; emphasis added).

If the deficient notice of damages required vacatur of the default judgment against an insurer in the position of Truck, an insurer participating as a *party* in coverage litigation, the constitutional deficiencies that precluded Condor (a non-party to the prior action) from contesting the merits of Eriksen's default judgment are manifest.[5] Indisputably, Condor had no notice of Eriksen's lawsuit (much less a specific Statement of Damages), until more than four years after the action was filed, and three months after the statutory time limit to set aside the default expired. The *offensive use* of collateral estoppel under the

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[5] *Pasadena Medi-Center Associates v. Superior Court*, 9 Cal.3d 773, 511 P.2d 1180 (1973) is inapposite. The quoted language in the Brief in Opposition makes clear that the California Supreme Court was addressing liberal construction of service of process statutes where "*actual notice has been received by the defendant* ..." (Brief in Oppos. at p. 9 [emphasis added].) As Condor received no notice, and was denied the opportunity to contest the merits of the claim, it cannot be bound by the default judgment.

circumstances violates the Due Process Clause. (Petition for Cert. at pp. 23-27; *Samson v. Transamerica Ins. Co.*, 30 Cal.3d 220, 238, 636 P.2d 32, 43 (1981) ("an insurer is not bound by a judgment unless it had notice of the pendency of the action").)

Permitting Eriksen to collect the default judgment from Condor calls to mind the Red Queen's decree from a favorite children's tale: "*Sentence first—verdict afterwards.*" LEWIS CARROLL, ALICE IN WONDERLAND, Ch. 12. Yet according to the interpretation the California courts have given to the PUC endorsement in this case, there will never be a verdict—nor even a trial—on the merits of Eriksen's claims in her collection action against Condor. That outcome cannot be reconciled with any principled application of the "minimum" constitutional protections steadfastly maintained by the precedents of this Court.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

Of Counsel:
GREGORY F. STANNARD
200 CORPORATE POINT,
SUITE 125
CULVER CITY, CA 90230-8721
(310) 642-6980

LARRY A. ROTHSTEIN
21700 Oxnard Street
Suite 960
Woodland Hills, CA
91367-3642
(818) 716-2662

HARRY W.R. CHAMBERLAIN II
Counsel of Record
MARTHA A. SHEN
GINSBURG, STEPHAN,
ORINGHER & RICHMAN, P.C.
10100 Santa Monica Blvd.,
8th Floor
Los Angeles, CA 90067-4012
(310) 557-2009

Attorneys for Petitioner
Condor Insurance Company

**SUPPLEMENTAL APPENDIX
IN SUPPORT OF JURISDICTIONAL STATEMENT**

SUPPLEMENTAL APPENDIX M—PETITION FOR REVIEW FILED DECEMBER 22, 1995, CONDOR INSURANCE COMPANY VS. LOS ANGELES COUNTY SUPERIOR COURT, California Supreme Court Case No. S050791 (excerpted)

[Pages 1-2:]

In the Supreme Court

of the

State of California

CONDOR INSURANCE COMPANY
Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES
Respondent.

LISA CHRISTINE ERIKSEN,
Real Party in Interest.

PETITION FOR REVIEW

I.
ISSUES PRESENTED

1. Whether the due process clauses of the state and federal Constitutions (Cal. Const., art. I, § 7; U.S. Const. Amend. 14, § 1) require that an itemized Statement of Damages be provided to a defendant who is served by publication (or means other than personal service) prior to the entry of a default and default judgment against that defendant?

2. Whether a default judgment taken against a defendant pursuant to a complaint that includes five separate causes of action against five separate defendants arising out of five separate motor vehicle accidents (each occurring on different dates and at different locations) violates due process where the Statement of Damages served upon the defaulted defendant contains only one unsegregated demand relating to all alleged general and special damages for all five accidents?

3. Whether an insurance company whose defendant-insured fails to transmit a lawsuit resulting in the entry of a default judgment, and whose now-bankrupt insured never advises the insurer of the default judgment thereby allowing the time to challenge that judgment under Code of Civil Procedure § 473 to expire, may nevertheless be precluded from challenging the judgment as constitutionally void in a subsequent action brought by the plaintiff-judgment creditor?

II.
WHY REVIEW SHOULD BE GRANTED

By this Petition, Condor Insurance Company ("Condor") seeks the resolution of important questions of constitutional dimension regarding the applicable standard for entry of default judgments against non-appearing defendants, and the corresponding right of a liability insurer for the defaulted defendant to subsequently challenge a constitutionally void judgment taken against its insured in a later action brought by the plaintiff-judgment creditor under Insurance Code § 11580.

* * *

[IV.
LEGAL ARGUMENT

Pages 18-20:]

Eriksen's reliance upon Home Indemnity Co. v. King (1983) 34 Cal.3d 803 is misplaced, and the trial court's adoption of Eriksen's position based upon that case was mistaken. Home Indemnity involved consolidated actions to determine the liability of two insurance companies with regard to a truck-and-trailer rig driver injured during loading operations by a forklift operator. The Court's opinion held that the trial court erred in declaring the insurer not bound by a stipulated judgment because the provisions of a PUC endorsement in the truck owner's policy contained "specific language guaranteeing payment of a *final judgment* obtained against its insured." Id. at 815-816. Eriksen contends that Home Indemnity stands for the proposition that Condor is precluded as a matter of law from challenging the default judgment. Not so.

Supp. Appendix M

Nothing in Home Indemnity supports the contention that the truck owner (Quality Rock), the truck driver (Schuler) or their liability insurer (Condor) in their stead is precluded from challenging a default judgment that was *void from the face of the record* due to violation of constitutional due process standards in its procurement. See Schwab, supra, 53 Cal.3d at 434-435; Parish, supra, 1 Cal.App.4th at 207-208, 210-212.

* * *

"All of the cases in which a judgment *not on the merits* has been found binding on an insurer were based upon the principle an insurer *who has an opportunity to defend* and wrongfully

fails to do so is liable on the judgment against the insured." Wright v. Fireman's Fund Ins. Cos. (1992) 11 Cal.App.4th 998, 1019 (emphasis added). [* * * footnote deleted.]

Because Condor had no opportunity to defend its insureds, the summary adjudication order unconstitutionally deprived Condor of its right to contest an invalid judgment. As illustrated by the trial court's decision, confusion still reigns regarding the enforceability of default judgments entered without notice to liability insurers, and review is warranted to clarify these perplexing questions for liability insurers such as Condor.

* * *

*** * * DENOTES TEXT DELETED. BRACKETED TEXT ADDED.**

SUPPLEMENTAL APPENDIX N—PETITION FOR REVIEW FILED ANUARY 29, 1998, LISA CHRISTINE ERIKSEN VS. CONDOR INSURANCE COMPANY, California Supreme Court Case No. S067653 (excerpted)

[Pages 1-2:]

In the Supreme Court

of the

State of California

LISA CHRISTINE ERIKSEN
Plantiff and Respondent,

VS.

CONDOR INSURANCE COMPANY
Defendant and Appellant.

PETITION FOR REVIEW

I.
ISSUES PRESENTED

1. In a "direct" action brought by a third party under Insurance Code § 11580, do the Due Process clauses of the State and Federal Constitutions and fundamental notions of fairness require that Appellant Condor Insurance Company ("Condor") be entitled to challenge enforcement of a constitutionally void judgment obtained against its insureds, as any other insurance company, individual or other entity would have the right to do?

2. By *"liberally construing* respondent's statement of damages [under §425.11]" including that the plaintiff's unsegregated demand for $750,000 in general damages and other damages according to proof against five (5) named defendants and Does 1 to 100, arising from five (5) separate and unrelated accidents against alleged tortfeasors who would be severally) (**not** jointly and severally) liable was constitutionally sufficient, does the Court of Appeal's decision conflict with this Court's decisions in Greenup v. Rodman (1986) 42 Cal.3d 822, and Schwab v. Rondel Homes, Inc. (1991) 53 Cal.3d 428 and better reasoned decisions of other Courts of Appeal (i.e., Parish v. Peters (1991) 1 Cal. App. 4th 202), which hold that the procedural requirements for obtaining entry of default judgment are to be **strictly construed** for the purposes of ensuring that minimum standards of Due Process are satisfied?

3. Did the Court of Appeal deny Condor its Due Process rights to defend the action brought by Plaintiff Lisa Christine Eriksen ("Eriksen") under Insurance Code §11580 by erroneously concluding that Condor's collateral attack on a void default judgment obtained by Eriksen against Condor's insureds in a prior litigation was untimely under Code of Civil Procedure §473 even though Condor did not even learn of the default judgment obtained against its insureds until **more than nine months after** that default judgment was entered?

II.
WHY REVIEW SHOULD BE GRANTED

By way of this Petition, Condor seeks the resolution of important questions of constitutional dimension regarding the applicable standard for entry of default judgments against non—appearing defendants, and the corresponding right of a liability insurer for the defaulted defendants to challenge in a subsequent action brought by the plaintiff-judgment creditor under Insurance Code § 11580 a constitutionally void judgment taken against its insureds.

* * *

[IV.
LEGAL ARGUMENT

Pages 16-18:]

Home Indemnity cannot be read so expansively as to preclude consideration of a carrier's notice and opportunity to be heard before there is a determination that a prior judgment has conclusive res judicata or collateral estoppel effect against that carrier in a separate proceeding. To do so would be to ignore this Court's decision in Samson v. Transamerica Ins. Co (1981) 30 Cal.3d 220. In Samson, this Court recognized "[t]he "general rule' that an insurer is not bound by a judgment unless it had notice of the pendency of the action . . . " in a case involving the very issue presented here, the liability to a third party claimant on a judgment obtained against the carrier's insured where the insurer's policy contains a PUC endorsement in the form mandated pursuant to P.U.C. General Order No. 100. Samson, 30 Cal.2d 224-229, 239 (citing Clemmer, *supra,* 22 Cal.3d 865).

As opposed to concluding, as the Superior Court did at Eriksen's urging in this case, that the existence of the PUC

endorsement by itself precluded any discussion of the carrier's right to notice and an opportunity to challenge the judgment obtained against its insureds, this Court in Samson specifically held that Transamerica was bound by the judgment both because it had actual notice of the accident and the lawsuit against its insured, *and* because it refused to defend its insured in the litigation and wrongfully rejected a reasonable settlement offer in the case. Samson, 30 Cal.3d at 237-239. For those reasons, this Court determined that ". . . 'it cannot now claim prejudice or lack of opportunity to litigate damages.' " Samson, 30 Cal.2d at 239 (quoting Clemmer, *supra*, 22 Cal.3d at 886).

Samson is thus consistent with Pacific Estates and Pruyn, the latter of which cases address policies *without* PUC endorsements. It is not violative of due process to apply principles of collateral estoppel or res judicata to bind an insurer to a judgment if the insurer had notice of the prior lawsuit an engaged in bad faith with respect to its obligation to defend the matter. All of these cases teach, however, that it is quite another matter, and unconstitutional, to impose binding liability in the absence of any notice to the insurer of the underlying claim prior to judgment being obtained, let alone in the absence of any evidence of a bad faith refusal to defend or settle the underlying claim on the part of the insurer.

Under the circumstances, Home Indemnity cannot be read so expansively as to preclude liability insurance carriers who have only agreed not to raise policy defenses to payment of final judgments obtained by third parties against the carriers' insureds, from insisting on their rights to raise other defenses to enforcement of the judgment, including that the judgment is constitutionally void.[6]

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[6] Furthermore, the PUC endorsement contained in the Condor policy does not contain an express waiver of the insurer's due process rights to challenge the judgment sought to be enforced against it. In the absence of a clear and express waiver of those constitutional

(footnote continues)

* * * Review is warranted to clarify that due process principles continue to require that liability insurers, including vehicle liability carriers, such as Condor—who did *not* have prior notice of the underlying action before the default judgment was entered against its insureds and who did *not* contribute in any manner to the entry of judgment by refusing to defend its insureds or by failing to contribute to a settlement before any adverse adjudication against the insured occurred—must be afforded an opportunity to challenge the enforcement of a constitutionally infirm judgment obtained against its insureds and the liability to be imposed on the carrier thereby.

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*** * * DENOTES TEXT DELETED. BRACKETED TEXT ADDED.**

(footnote continued)
rights, Condor cannot be presumed to have waived them. See, Fuentes v. Shevin (1972) 407 U.S. 67, 95, 92 S.Ct. 1983, 2002, 32 L.Ed.2d 556 ("a waiver of constitutional rights in any context must, at the very least be clear. We need not concern ourselves with the involuntariness or unintelligence of a waiver when the contractual language relied upon does not, on its face, even amount to a waiver.") *see also*, D.H. Overmyer Co., Inc. of Ohio v. Frick Co. (1972) 405 U.S. 174, 185-186, 92 S.Ct. 775-782, 31 L.Ed.2d 124 (any waiver of due process rights must be shown voluntary, knowing and intelligently made with knowledge of legal consequences).